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IN THE

Supreme Court of the United States

MCKESSON HBOC, INC., et al.,
Conditional Cross-Petitioners
v.
ISLAMIC REPUBLIC OF IRAN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Conditional Cross-Petition for a Writ of Certiorari

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May 16, 2002

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QUESTIONS PRESENTED BY THE CONDITIONAL CROSS-PETITION

1. Whether the court of appeals erred in reversing summary judgment against Iran on the issue of liability, and remanding the case for trial after 20 years of litigation, even though the court made no finding that a reasonable trier of fact could find in favor of Iran, and even though the record evidence would not support any such finding.

2. Whether McKesson should have been awarded compound prejudgment interest, rather than simple interest, to make McKesson whole for the expropriation of its investment by Iran more than 20 years ago.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

1. Conditional cross-petitioners, who were appellees and cross-appellants in the court of appeals, are McKesson HBOC, Inc., (formerly known as McKesson Corporation, and before that as Foremost-McKesson, Inc.), a Delaware corporation, and three wholly-owned subsidiaries, Foremost-Tehran, Inc., Foremost Shir, Inc., and Foremost Iran, Inc. (collectively, "McKesson").

2. The Overseas Private Investment Corporation ("OPIC"), an agency of the United States, also was an appellee and cross-appellant in the court of appeals.

3. The Islamic Republic of Iran ("Iran"), a foreign state, was the appellant/cross-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, McKesson HBOC, Inc. states that it is a publicly-owned company. It has no parent and there is no publicly-held company that owns 10 percent or more of McKesson's stock.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

McKesson respectfully submits this conditional cross-petition, requesting that, if the Court grants Iran's petition in No. 01-1521, the Court also grant review with regard to the two additional questions presented here.

OPINIONS BELOW

The opinion of the court of appeals is reported at 271 F.3d 1101 and is reproduced in the appendix to Iran's petition ("PA __") at 1a. The opinion of the district court granting McKesson's motion for partial summary judgment on liability is reproduced at PA 88a. The opinion of the district court denying Iran's second motion for summary judgment and first motion for reconsideration is reproduced in the appendix to this conditional cross-petition ("CA __") at CA 23a. The opinion of the district court denying Iran's third motion for summary judgment and second motion for reconsideration is reproduced at CA 20a. The opinion of the district court declining to include compound prejudgment interest as an element of damages for Iran's expropriation of McKesson's investment is reported at 116 F. Supp.2d 13 and is reproduced at PA 27a, with the discussion of prejudgment interest beginning at PA 77a. The opinion of the district court denying McKesson's motion for reconsideration of the compound interest issue also is reported at 116 F. Supp.2d 13, and is reproduced at CA 5a.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2001. The parties' timely petitions for

rehearing and rehearing *en banc* were denied on January 11, 2002. PA 20a and CA 1a, 3a. Iran's petition for a writ of certiorari was filed on April 11, 2002, and docketed on April 16, 2002. Under this Court's Rule 12.5, this conditional cross-petition is filed within 30 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTERNATIONAL AGREEMENT INVOLVED

The relevant provision of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed at Tehran on August 15, 1955, and entered into force on June 16, 1957, TIAS 3853, 8 U.S.T. 899 ("Treaty of Amity" or "Treaty") is as follows:

> Article IV.2 Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

STATEMENT OF THE CASE

Many of the background facts and much of the procedural history relevant to the issues raised by this cross-petition are set forth in McKesson's brief in opposition ("Opp.") to Iran's petition. *See* Opp. at 1-8. The discussion below focuses on the specific facts and procedural history relating to the questions presented here.

In January 1982, McKesson filed this action in the United States District Court for the District of Columbia against the Islamic Republic of Iran ("Iran"), several agencies or instrumentalities of Iran that were shareholders in Pak Dairy, and Pak Dairy itself. The complaint alleged that Iran, acting through the co-defendant agencies and instrumentalities, illegally divested McKesson of its equity interest in Pak Dairy. PA 161a. Under Executive Order No. 12,294, 46 Fed. Reg. 14,111 (1981), the litigation was stayed while McKesson presented its claims to the Iran-United States Claims Tribunal ("Claims Tribunal") in The Hague.

In the course of proceedings before the Claims Tribunal, counsel for Pak Dairy argued that it had no obligation to pay McKesson its dividends because McKesson had not physically "come to the company" in Tehran to collect its dividends, in accordance with what Pak claimed was the "custom and practice" in Iran. L 182-L 184.[1/] The Tribunal was not persuaded, and ruled in April 1986 that the Dairy's deliberate cutoff of dividends to McKesson, starting in 1979, was done "with the object of discriminating against [McKesson]." L 205-L 206. It thus awarded McKesson the unpaid dividends declared by Pak Dairy in 1979 and 1980, before the Tribunal's January 1981 jurisdictional cut-off date. L 214.

McKesson revived this lawsuit in April 1988 by filing a motion for partial summary judgment against Iran as to liability, alleging that McKesson's equity interest in Pak Dairy had been the subject of a "creeping expropriation" by Iran that was complete after January 1981. PA 4a, 98a.

1/ "L __" refers to McKesson's Lodging in this Court, which consists of documents from the joint appendix in the court of appeals, the appendix to McKesson's petition for rehearing in the court of appeals, and the district court record.

Eight years later, Iran raised its "come to the company" defense for the first time in this litigation, recasting it this time as a requirement – either of Iranian corporate law or of Pak Dairy itself – rather than merely a custom or practice. The district court reviewed the record and determined that Iran's defense was unsubstantiated by any credible evidence. *See* 1997 WL 361177 (June 23, 1997) (PA 110a-112a). The district court accordingly granted summary judgment in favor of McKesson as to Iran's liability for expropriating McKesson's investment in Pak Dairy. *Id.*, PA 123a.

Iran twice moved for reconsideration, or in the alternative for summary judgment, arguing that its affidavits and legal opinions were sufficient to establish its "come to the company" defense. *See* CA 20a-28a. Despite its "repeated efforts" and "voluminous filings," however, Iran never offered "a single piece of contemporaneous evidence that establishes that Pak Dairy's board of directors ever officially adopted a 'come to the company' requirement." CA 26a. It was undisputed, moreover, that "no Iranian statute or other legal authority mandat[es] the 'come to the company' practice," and Iran's expert did "not cite[] any such authority in his four affidavits." CA 21a. The district court also held, "based on the entire record in this case, including the opinion of the Claims Tribunal, it . . . would have been futile for McKesson to attempt to comply with the alleged 'come to the company' requirement." CA 22a. The district court therefore adhered to its decision to grant summary judgment to McKesson on the issue of Iran's liability. CA 22a, 28a.

In May 2000, after a four-week trial on damages, the district court awarded $20 million to McKesson and OPIC for the expropriation of McKesson's equity investment in Pak Dairy, plus unpaid dividends declared by Pak Dairy in 1981 and 1982. PA 27a. In calculating McKesson's damages, the court recognized that McKesson was entitled to prejudgment interest as an element of just compensation for

its expropriated property. The court held, however, that customary international law permitted only simple (as opposed to compound) prejudgment interest. PA 77a, 80a-81a. In denying McKesson's motion for reconsideration on this point, the court explained at length why, in its view, it lacked discretion to award compound interest. CA 6a-17a. At the very end of its opinion, the court stated that "even if customary international law authorizes an award of compound interest at the discretion of the awarding body, this Court finds the almost uniform practice of awarding only simple interest is a relevant and compelling consideration in the exercise of that discretion." CA 17a.

Iran appealed on numerous grounds, and McKesson cross-appealed on the denial of compound prejudgment interest. The court of appeals affirmed the district court in most respects, but reversed the award of summary judgment as to Iran's liability. PA 19a. The court held that Iran had made a "credible showing" that the Dairy had adopted a requirement that its shareholders physically "come to the company" in Tehran to collect their dividends. PA 12a-14a. The court based this conclusion entirely on two statements by Pak Dairy's chief accountant, Alireza Dadyar. In the first, which appeared in an affidavit submitted by Iran in support of its opposition to McKesson's partial summary judgment motion, Dadyar asserted that "dividends are paid to shareholders by means of a cheque, and the shareholders must come to Pak Dairy to receive the cheque." L 255. In the second, made in an affidavit submitted with Iran's motion for reconsideration, Dadyar speculated that this policy was "the mode of payment chosen by Pak Dairy, either by its General Meeting [of shareholders] or [by its Board of Directors] . . . [s]ince long ago, in particular in 1981 and 1982 and up to the present." L 300.

Iran submitted no corporate documents to support Dadyar's conclusory statement that Pak Dairy had adopted a "come to the company" requirement. The court of appeals recognized this deficiency, but held that his statement was sufficient to overcome summary judgment because, in the court of appeals' view, McKesson had adduced "no evidence to the contrary." PA 13a-14a. The court ignored substantial record evidence contradicting the Dadyar affidavits, and failed to take into account inconsistencies between Dadyar's affidavits and the affidavit of Pak's Managing Director, as well as internal inconsistencies in Dadyar's affidavits themselves. The Court did not address the district court's finding that Iran controlled Pak Dairy and had access to its records, or the fact that Iran had been afforded numerous opportunities over many years to present whatever evidence was available to it.

The court also held that if Iran is given the benefit of a "reasonable inference," which allegedly can be drawn from a telex that Pak Dairy sent to McKesson in November 1981 referring to "Pak's readiness for taking proper measures . . . [a]s regards the payment of [McKesson's] dividend," there is a genuine issue as to whether it would have been futile for McKesson to have attempted to collect its dividends from Pak by sending someone to Tehran for that purpose after the Iranian Revolution. PA 14a-15a. In so holding, the court ignored evidence establishing the futility, in post-Revolutionary Iran, of McKesson's attempting to collect its dividends in Iran. The court also overlooked the fact that a McKesson representative did appear in person at Pak Dairy in March 1981 to request McKesson's dividends, but to no avail.

Finally, although the court of appeals agreed with McKesson "that contemporary international law does not, as the district court seems to have thought, require simple interest," it held that the district court's abrupt reference to

discretion at the end of its opinion denying McKesson's motion for reconsideration was sufficient to withstand review. Specifically, the court rejected McKesson's arguments that (1) the district court should have applied federal common law principles, under which compound interest is the norm, and (2) that the proper exercise of discretion required the district court to consider whether compound interest is warranted under the facts and circumstances of this particular case in order to make McKesson whole, and that its failure to do so constituted an abuse of discretion. PA 19a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

If the Court grants Iran's petition, it should also grant this conditional cross-petition to review the court of appeals' rulings on liability and compound interest. Review of the questions presented by Iran will necessitate review of the same record evidence that bears on the district court's grant of summary judgment as to liability. Accordingly, if the Court were to grant Iran's petition, review of the summary judgment issue presented here would not substantially expand the scope of the Court's review. In addition, the court of appeals departed from this Court's well-established guidelines for appellate review of summary judgment rulings, including (a) the requirement that the court of appeals must consider the entire record before the district court, viewed through the prism of the substantive evidentiary burden applicable at trial, (b) the rule that the nonmoving party cannot create a genuine issue of fact sufficient to survive summary judgment by submitting an affidavit that contradicts prior affidavits of the same party, absent an explanation sufficient to permit a reasonable fact finder to rule in its favor, and (c) the more general requirement that summary judgment not be reversed based on an alleged issue of fact unless the reviewing court is

satisfied that on remand a reasonable fact-finder could enter judgment in favor of the non-moving party. The court below remanded the case for trial without any indication that it considered these issues. After more than 20 years of litigation, the district court's summary judgment ruling should not have been overturned unless the court of appeals had a clear record basis to believe that a reasonable trier of fact could find in Iran's favor at trial. The record contains no such basis.

With respect to prejudgment interest, the courts below should have applied the federal common law rule, under which compound prejudgment interest is the norm, so as to make McKesson whole for the long delay in obtaining compensation. Although the court of appeals confirmed that the district court was wrong in concluding that it was legally precluded from awarding compound interest, the court nevertheless affirmed on the ground that the district court properly exercised its discretion at the end of its ruling on reconsideration. But that result conflicts with this Court's repeated admonition that discretionary choices must be based on sound legal principles, as well as the particular facts and circumstances of the case at hand. Here, the district judge exercised his discretion entirely on the basis of his mistaken view of the practice of other courts and arbitral tribunals, in cases that involved considerations that are neither relevant nor appropriate to the case presented here.

I. THE COURT OF APPEALS VIOLATED WELL-ESTABLISHED PRINCIPLES GOVERNING REVIEW OF SUMMARY JUDGMENT AWARDS BY FAILING TO CONSIDER ALL OF THE PERTINENT RECORD EVIDENCE, FAILING TO ACCOUNT FOR IRAN'S EVIDENTIARY BURDEN, AND FAILING TO DETERMINE WHETHER A REASONABLE TRIER OF FACT COULD FIND FOR IRAN BASED ON ALL OF THE EVIDENCE.

Iran's "come to the company" defense blossomed very late in the course of this protracted litigation. It was first presented by counsel for Pak Dairy, in the course of proceedings before the Claims Tribunal, as a matter of "custom and practice." L 182 - L 184. The defense was unsuccessful. L 205-L 206. In the district court, Iran litigated the case for fourteen years before reviving its custom and practice defense. Without any evidentiary support, it recast the defense as a purported requirement under Iranian corporate law and, later, as a requirement allegedly adopted by Pak Dairy's board of directors. The district judge, who presided over the case from 1988 onward and was intimately familiar with the record, properly concluded that Iran's defense was negated by the undisputed facts and law, and thus presented no obstacle to summary judgment.

In substituting its own judgment for the district court's, the court of appeals committed a number of serious legal errors. First, the court disregarded relevant evidence and therefore reached an erroneous conclusion regarding the inferences that permissibly could be drawn from the evidence on which Iran relies. Second, the court ignored the quantum of evidence necessary to support a reversal of summary judgment where, as here, the nonmoving party bears the burden of proving its defense. Correction of these

errors is warranted, should the Court decide to grant Iran's petition, to reaffirm the Court's summary judgment jurisprudence and to spare McKesson, whose claims have been pending since 1982, the additional cost and delay of a liability trial that is manifestly unnecessary.

A. The Court of Appeals Violated Well-Established Summary Judgment Principles in Reversing the Summary Judgment Award.

Relying entirely on the two unsupported Dadyar affidavits, the court of appeals overruled the district court's finding that Iran failed to raise a genuine issue as to whether Pak Dairy adopted a "come to the company" requirement. PA 12a-14a. Although the court acknowledged case law holding that a party cannot avoid summary judgment by relying on unsupported affidavits, the court declined to follow that rule, explaining that, in this case, "McKesson has submitted no evidence" to contradict the unsupported affidavits. PA 13a. That assertion is wrong, and betrays a fundamental lack of familiarity with the record. In fact, the record is replete with evidence that not only contradicts Iran's affidavits but establishes conclusively that Pak Dairy never adopted any "come to the company" requirement. *See infra* at 13-23.

The court committed the same error in holding that a November 1981 telex from Pak Dairy to McKesson expressing Pak's "readiness for taking proper measures . . . [a]s regards the payment of [McKesson's] dividend" was sufficient by itself to create a genuine issue as to whether it would have been futile for McKesson to "come to the company" and claim its dividends. The evidence before the district court, which the court of appeals again ignored, established the context of Iran's telex and demonstrated that in fact, the "proper measures" to which Iran referred were settlement ***negotiations*** in Vienna, not payment in Tehran.

See infra at 22-23 & n.12. Moreover, other evidence in the district court record – including documents establishing that just a few months before November 1981 McKesson's representative actually had "come to the company" in Tehran and demanded payment of McKesson's past-due dividends – negates any inference favorable to Iran that a reasonable fact-finder possibly could draw from the telex on which the court of appeals relied. *See infra* at 21-22.

This Court has made clear that, when reviewing a district court's award of summary judgment, a court of appeals must consider the entire record before the district court. *See, e.g., Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The important and salutary purposes served by Rule 56, often recognized by this Court, cannot be realized if courts of appeals are free to reverse summary judgment based on an incomplete consideration of the entire record, as the court plainly did in this case. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Similarly, this Court has emphasized that an issue of fact may only be considered "genuine," and therefore capable of precluding summary judgment, if the evidence relied upon by the party opposing summary judgment "is such that a reasonable [fact-finder] could return a verdict" in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Cox v. Kentucky Dep't of Trans.*, 53 F.3d 146, 150 (6th Cir. 1995). Thus, in reviewing the award of summary judgment, the question for the court of appeals was whether the district court reasonably could have found for Iran on the record before it. *Matsushita*, 475 U.S. at 587; *Elwell v. University Hosps. Home Care Servs.*, 276 F.3d 832, 837 (6th Cir. 2002); *Lawshe v. Simpson*, 16 F.3d 1475, 1478 (7th Cir. 1994); *Pyramid Securities, Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1116 (D.C. Cir. 1991); *see also Anderson*, 477 U.S. at 252 ("[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be

insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]"). In this case, however, there is no indication that the court of appeals ever considered, in light of the entire record before the district court, whether Iran's unsupported affidavits and single telex could have supported a judgment in Iran's favor at trial. *See* PA 11a-15a.

This Court also has held that, in ruling on a motion for summary judgment, the court "must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254; *see also Celotex*, 477 U.S. at 323 (moving party entitled to summary judgment when nonmoving party fails to make sufficient showing on element of case as to which it has burden of proof at trial); *Johns Hopkins Univ. v. Cellpro, Inc.*, 152 F.3d 1342, 1359-60 (Fed. Cir. 1998) (relying on substantive evidentiary burden in affirming summary judgment for plaintiff on issue as to which defendant bore burden of proof at trial) (citing *Anderson*); *In re Agricultural Research & Tech. Group, Inc.*, 916 F.2d 528, 540 (9th Cir. 1990) (same). Here, once again, there is no indication that the court of appeals gave any weight to the fact that, at trial, Iran would bear the burden of establishing the elements of its "come to the company" defense. *See* PA 11a-15a; *see, e.g.*, *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) ("the burden of producing evidence in support of a defense is, of course, normally on the defendant"). On the contrary, review of the relevant evidence set forth below, in comparison with the evidence relied on by the court of appeals, demonstrates that the court could not have reversed the award of summary judgment without disregarding the parties' relative evidentiary burdens.

B. The Court of Appeals Overlooked Important Evidence that Justified the District Court's Summary Judgment Award.

1. The Court's Belief That McKesson Submitted No Evidence Contrary To Dadyar's Affidavits Was Clearly Erroneous.

The court of appeals' statement that McKesson submitted no evidence to counter Dadyar's "come to the company" testimony overlooks key evidence in the record.

First, Leonard Patterson, who since 1976 has been responsible for McKesson's corporate and legal affairs relating to Pak Dairy, testified by affidavit from personal knowledge that

> at no time was [McKesson] aware of a legal requirement that shareholders of Pak Dairy must send a representative to the company's premises in order to collect its dividends and shareholder communications . . . . If there was [such a requirement], neither Pak Dairy nor anyone else ever so apprised [McKesson].[2/]

This testimony is corroborated by contemporaneous evidence: a June 5, 1980 telex from McKesson to Pak Dairy stating that McKesson was unaware of any legal basis for

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2/ Fourth Affidavit of Leonard M. Patterson, Jr. (Sept. 9, 1997) ("Patterson Aff. IV") (appended to Plaintiffs' Opposition to Iran's Second Motion for Summary Judgment or, in the Alternative, for Reconsideration) at ¶ 3 (L 19 – L 20).

Pak's denial of its written demand for payment of its dividend.[3/]

Second, Frank Fisher, who served as Pak Dairy's Managing Director from 1964 to 1979, submitted an affidavit in 1983 describing the Dairy's process for paying dividends to foreign shareholders during his tenure. That process involved no "come to the company" procedure.[4/]

Third, on cross-examination by Iran at the trial on damages, Patterson testified that prior to the cut-off of dividends by Pak's board of directors, McKesson routinely received its dividends in San Francisco through normal banking channels within a few weeks after the dividends were declared by the Pak board.[5/] There was no trial testimony that supported Iran's "come to the company" defense.

Fourth, Pak Dairy's Articles of Association, which contain

3/ See Third Affidavit of Leonard M. Patterson (May 6, 1996, 1996) ("Patterson Aff. III") (L 243) and Exh. 8 (copy of June 5, 1980 telex) (L 121).

4/ Appendix to Plaintiffs' Motion for Partial Summary Judgment, Exh. 2 (Affidavit of Frank Fisher) ("Fisher Aff.") at ¶ 25 (L 33). At an early stage of the case, after Mr. Fisher's death, the Fischer affidavit was ruled inadmissible on hearsay grounds. Subsequently, however, Iran itself relied on the affidavit, calling it "incontrovertibl[e]" evidence. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Renewed Motion for Partial Summary Judgment Against Defendant the Islamic Republic of Iran (May 13, 1996) at 23 n.29 and Exh. 6 (Excerpts from Iran's Appellate Briefs) (L 354 - L 361). Iran thus waived any objection to the affidavit.

5/ See Trial Transcript (1/20/00) at 56:8-16 (L 42). In determining whether there remains any genuine issue of material fact that warrants a trial, this Court should look to the entire record on appeal, including the trial transcript. That is especially so where the relevant testimony was elicited by Iran itself on cross-examination.

the Dairy's binding rules for the payment of dividends to shareholders, do not include a "come to the company" requirement. L 1 - L 18. The absence of any such provision in the Articles is persuasive evidence that no such requirement was ever adopted by the company.

Fifth, the record includes minutes of numerous Pak Dairy shareholders' meetings and board of directors' meetings between 1979 and 1982, many of which discuss the Pak board's withholding of dividends to McKesson. Not one of those meeting minutes contains so much as a hint that Pak Dairy ever required its shareholders to come to the company for their dividends, or that the Dairy was withholding payment of McKesson's dividends based on such a requirement. To the contrary, those corporate documents showed a deliberate decision by the Dairy's board of directors to deny dividends to McKesson for one reason only: McKesson was American and the company had adopted anti-American policies imposed by the Government of Iran.[6/]

Sixth, none of the correspondence between the parties mentions a "come to the company" requirement. In response to McKesson's written demands for payment of its dividends, the Dairy's management simply reported that such payments to Americans or "foreign shareholders" were not allowed. For example, Pak's May 27, 1980 response to a May 21, 1980 demand from McKesson (L 43 – L 44) made no mention of any procedural deficiency in McKesson's written request for its dividends. On the contrary, Pak explained that it would not pay because, "due to decision and instruction of the board of directors, Pak Dairy can not pay

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6/ *See, e.g.*, Minutes of Pak board meeting (April 29, 1981) (L 262, L 266); Patterson Aff. III, Exh. 12 (minutes of annual Pak shareholders' meeting, April 11, 1981), at 2 (L 47).

any sums of money for any reason to foreign shareholders." L 45.[7] McKesson's June 5, 1980 request for an explanation of "the legal basis for this denial" went unanswered. L 243; L 121.

Further, the Tribunal (which included an Iranian arbitrator) ***unanimously*** decided that Pak Dairy's withholding of McKesson's dividends for 1979 and 1980 was "a clear breach of [its] duty" to pay declared dividends to all of its shareholders, notwithstanding Iran's argument that McKesson failed to come to the company for its dividends.[8] Rejection of the purported "come to the company" defense was embodied in the Tribunal's ultimate conclusion that Pak Dairy had breached its duty to pay the dividends, and that Iran was liable for that breach. The court of appeals disregarded both the preclusive effect and the underlying factual basis of the Tribunal's ruling.

The district court's award of summary judgment also was supported by the adverse inference rule. In 1991, McKesson requested that Iran produce Pak records, including all minutes of board and shareholder meetings, communications with shareholders, and documents disclosing payment or non-payment of dividends. L 51, L 55-L 56.[9] But Iran largely failed to comply with McKesson's discovery requests. The responsive documents that Iran did produce contained no hint of a "come to the company" requirement.

7/ *See also* Telex from Pak to McKesson (Sept. 28, 1981) (L 180).

8/ *See* Tribunal Award at 252 (L 209); *see also* Pak Dairy Complementary Statement of Defense filed with the Tribunal (1983) (L 182 - L 184).

9/ Iran, as Pak's principal, presumptively had complete access to its books and records – as did Iran's affiant, the dairy's chief accountant. The district court so held. *See* CA 21a.

See CA 26a-28a. Iran's failure to produce supporting documents mandates the inference that, in fact, Pak never adopted a "come to the company" requirement. *See, e.g., Norfolk & Western R.R. Co. v. Transportation Comm. Int'l Union*, 17 F.3d 696, 702 (4th Cir. 1994) ("The drawing of an adverse inference against a party who fails to come forward with relevant evidence within its control is a reasonable and well-recognized evidentiary rule"); *Alabama Power Co. v. Federal Power Comm'n*, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974) ("It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffer[ing] an adverse inference from failure to do so.").

2. Inconsistencies In Iran's Own Evidence Establish That the Dadyar Affidavits Do Not Raise a Genuine Issue of Fact.

In 1991, Iran submitted the affidavit of Masoud Pezeshk, Pak Dairy's Managing Director, which states that McKesson, "according to rules and provisions of [Pak Dairy's] Articles of Association, [may] ***refer to or otherwise correspond*** with Pak Dairy . . . in order to receive [its] dividends." L 235 (emphasis added). Five years later, Mr. Dadyar submitted the first of three affidavits in which he outlined a more demanding procedure, contending that shareholders "***must come to Pak Dairy to receive [their dividend].***" L 255 (emphasis added). Although he stated that he "studied" the Pezeshk affidavit, Dadyar made no attempt in his first affidavit to explain the inconsistency between his explanation (which is silent on the option of receiving dividends by correspondence) and that of his Managing Director. Two years later, after McKesson brought this inconsistency to the attention of the district court, Mr. Dadyar submitted a second affidavit. There, he asserted that Pezeshk's testimony

> is not inconsistent with my statement but supplements it. I believe Mr. Pezeshk meant that if [McKesson] could not send a representative to receive the dividends, it could correspond with Pak Dairy informing the latter how it wished to collect its dividends so that the matter could be considered and decided by the company.

L 296. By admitting to the availability of a procedure under which shareholders were entitled to request their dividends by correspondence – ***a procedure that McKesson in fact followed in this case without receiving payment***, *see infra* at 21-22 – Pezeshk's affidavit and Dadyar's second affidavit undercut whatever evidentiary value Dadyar's first affidavit might have had with respect to establishing a genuine issue for trial.

A second key inconsistency involves Dadyar's attempt to explain the source of the alleged "come to the company" rule. He asserts in his several affidavits that the exercise of shareholder rights is governed by Pak Dairy's Articles of Association, and he cites various sections of the Articles to support his statements. L 253 - L 255; L 296 - L 297. Dadyar cites no provision in the Articles that requires shareholders to come to the company to receive their dividends, however. This is not an oversight, because the Articles do not contain such a requirement. PA 110a; L 1 - L 18.

Dadyar offered no explanation, from personal knowledge or otherwise, as to how Pak Dairy could have adopted such a significant requirement governing the payment of dividends to shareholders without incorporating it in the Articles, along with the company's other dividend procedures. When plaintiffs pointed out this defect in Dadyar's testimony, Iran submitted a ***third*** affidavit by him. There, he speculated that the "come to the company" requirement was "chosen by Pak Dairy, either by its General

Meeting [of shareholders] or [by its Board of Directors] pursuant to authority under Article 57 of the Articles of Association" and the Iranian Commercial Code. L 300. Yet, despite his access to Pak Dairy's books and records, Dadyar was unable to present any minutes of meetings, resolutions, or other evidence indicating that Pak Dairy's shareholders or directors had ever exercised such authority and adopted the purported requirement. Nor did he attempt to explain this inability.

What the court of appeals viewed as Dadyar's "first-hand knowledge" of his company's "come to the company requirement" is, on closer scrutiny, nothing more than uncorroborated and self-serving speculation, riddled with inconsistencies with his Managing Director's affidavit, his own subsequent affidavit, and his company's organic documents. As such, Dadyar's affidavits do not have sufficient evidentiary value to withstand summary judgment on liability. *See Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 806-07 (1999) (holding that nonmoving party cannot create a genuine issue of fact sufficient to survive summary judgment by submitting affidavit that contradicts prior affidavit of same party, absent an explanation sufficient to permit a reasonable fact finder to rule in its favor); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1503 (D.C. Cir. 1989) (district court properly granted summary judgment where nonmoving party's affidavits were internally inconsistent and at odds with documentary evidence).

3. Even If Pak Dairy Had a "Come to the Company" Requirement, the Futility of Any Effort by McKesson to Comply With It Is Not Genuinely in Dispute.

Even if there had been a "come to the company" requirement, there is substantial record evidence – none of

which the court of appeals addressed – demonstrating that it would have been futile for McKesson to attempt to comply. L 61 – 80, L 487 – 490. For instance, it is well-known, and the record evidence shows, that intense animosity against Americans was a central precept of the Iranian government and legal system in the years following the Revolution.[10/] As recently as 1992, the Speaker of the Iranian Parliament stated that the possibility of investment by U.S. companies in Iran "does not exist in Iran at all with regard to the attitudes of the people and the leader of the revolution toward the United States." *See* L 94, L 95; *see also* PA 11a ("Iran's post-revolutionary courts cannot provide adequate remedies for U.S. claims"). There is no question that the state of affairs in Iran during the time period relevant to this case, after the Revolution and during and after the American hostages were being held captive, was extremely hostile for American companies like McKesson.

The official Iranian policy of anti-Americanism, implemented through business decisions made in the Dairy's boardroom, drove Pak Dairy to deprive McKesson of the benefits of its shareholding in the company. From late 1979 onward, Pak's board of directors adopted and maintained a policy of refusing to pay any money owed to McKesson for any reason.[11/]

10/ *See, e.g.*, L 88 (report of U.S. State Department warning on January 27, 1981, after Iran's release of American hostages taken at U.S. Embassy in Tehran, against travel by Americans to Iran: "All U.S. citizens should avoid such travel because of the continuing anti-American feeling, . . . and the virulently anti-American stance of the Iranian government.").

11/ In late 1979, Pak's board ceased all payments owed under its contracts with McKesson. *See* Minutes of Pak board meeting (Nov. 15, 1979) (handwritten note by Dr. Ameli, observing that, "[a]s stated in previous meetings, all foreign contracts of the company must be reconsidered, and are not valid in my opinion, and any payment in this connection shall be illegal"), Fisher Aff., Exh. 13 (L 97); Minutes of Pak

Several times, McKesson tried without success to obtain its dividends by sending a written demand, and in one case an Iranian representative, to Pak Dairy. In June 1980, Pak's Managing Director reported to the Pak board concerning McKesson's written request that its dividends be paid, but the board decided that "no payment will be made to the foreigners." L 122 (minutes of board meeting, June 3, 1980) at ¶ 6.

In March 1981, McKesson asked its duly authorized Iranian representative on the Pak board, Gholam Vahdati, to present a formal request for payment of McKesson's dividends at the next Pak Dairy board meeting. L 124. Vahdati personally delivered a written demand at the board meeting held on April 29, 1981. L 262, L 266, L 267. The minutes show that the demand was referred to an Iranian governmental body responsible for "International Claims" for review. *Id.* The dividends were never paid.

The court below read out of context the November 1981 telex from Pak Dairy to McKesson, which referred to "Pak's

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board meeting (Dec. 5, 1979) at ¶ 5 (statement by director Ameli that "under the present circumstances no payment should be made to the foreigners with regards to these contracts until later when the matter is approved by the Board of Directors" (which approval was never given)) (L 102); Minutes of Pak board meeting (March 10, 1980) at 25-26 (statement by Ameli: "because of the existing dispute between Iran and the United States, payment of profits to foreign share holders has to be kept pending for the time being") (L 105 – L 106); Minutes of Pak shareholders' meeting (April 14, 1980) (declaring dividend, but noting "prohibition of payment to foreigners") (L 111); April 1980 letter from Pak Board Chairman Haghshenas to Pak Dairy shareholders (observing that since the Revolution not a cent was paid, in cash or bonus shares, to foreign shareholders) at 1-2 (L 114 – L-115); Telex from Gholam Vahdati (McKesson's representative on the Pak board) to Sabin Phelps of McKesson (Jan. 13, 1981) ("My information from Account Dept. is that local shareholders have indeed received their cash dividends but currently no foreign payments are permitted.") (L 117).

readiness for taking proper measures . . . [a]s regards the payment of [McKesson's] dividend." L 137; *see* PA 14a. That telex was the last in a series of communications, initiated by McKesson three months earlier, which reflect a failed attempt to obtain payments on its claims prior to commencing arbitration at the Tribunal.[12/] It is clear that this telex did not in fact contain any offer to pay dividends. The entire exchange shows that the November 1981 telex was nothing more than a last attempt by Pak Dairy to interest McKesson in returning to Vienna to negotiate a settlement of its claims. That is not a sufficient basis to raise a genuine issue about the futility of McKesson "coming to the company" in Iran. Indeed, just a few months earlier, McKesson's Iranian representative had gone in person to a Pak board meeting and demanded payment of McKesson's

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12/ McKesson's telex of Aug. 26, 1981 (L 125, L 126) set forth McKesson's claims and indicated the claims would be filed with the Tribunal on Oct. 19, 1981 unless the parties reached a settlement before then, and offered to meet in Vienna to negotiate a settlement. Pak Dairy's response on Sept. 16, 1981 (L 127) accepted the invitation to meet "in due time" in Vienna for "negotiation and settlement of the claims." On Sept. 22, 1981, McKesson replied (L 128), proposing to meet with Pak Dairy from Oct. 6-9. Pak replied on Sept. 28 (L 180), stating "you will be shortly notified of the exact date of negotiations." McKesson's telex of Oct. 9 (L 131, L 132) indicates that its representative arrived in Vienna on Oct. 6, notified Pak, and returned to the United States on Oct. 9 without receiving any word from the Dairy. An Oct. 10 telex from Pak (L 133, L 134) proposed to meet McKesson in Vienna from Oct. 15-18 for negotiation. McKesson notified Pak on Oct. 13 that this was insufficient notice and unacceptable. L 135. Then, on Oct. 23, McKesson notified Pak that it was resigning from the Pak board L 136. Pak responded with its Nov. 11, 1981 telex (L 137 – L 138), which is the one on which the court of appeals relied. There (in ¶6) Pak states: "As you know, this company has already expressed its readiness for ***negotiating*** in Vienna, but you have actually refused ***negotiations*** by faking up excuses and you have probably sent the referenced telex in the baseless hope of filing a lawsuit against [Iran]." L 138 (emphasis added). McKesson filed its Statement of Claim with the Tribunal on Nov. 16, 1981.

past-due dividends, to no avail. No reasonable finder of fact could find, on the basis of the November 1981 telex, that it would *not* have been futile for McKesson to attempt to go to Iran to collect its dividends.

The evidence summarized above shows that McKesson was caught up in a process in which the ordinary corporate formalities in Iran no longer protected its interests as a shareholder in Pak Dairy. The Iranian government instrumentalities that brought about this expropriation were expressly carrying out the will of the new government of Iran to cut the flow of funds to Americans. Iran's "come to the company" defense is a fiction, concocted for purposes of litigation and unsupported by any documentary evidence. It is not an appropriate use of scarce judicial resources, nor is it fair, now to require McKesson, on the basis of this record compiled during two decades of litigation, to return to the district court for trial. If this Court is inclined to grant Iran's petition, then it should also grant this cross-petition and determine whether the district court's liability judgment should be reinstated.

II. SIMPLE PREJUDGMENT INTEREST CANNOT MAKE MCKESSON WHOLE, AS THE APPLICABLE LAW REQUIRES.

There is no settled principle of customary international law governing the availability of compound prejudgment interest. PA 17a-18a. Where such a rule is lacking in a case otherwise controlled by international law, federal courts apply federal common law. PA 79a (citing *Forman v. Korean Air Lines Co., Ltd.*, 84 F.3d 446, 450 (D.C. Cir. 1996)); *see also Matter of Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1333 (7th Cir. 1992) (applying federal common law in determining availability of compound interest on claims governed by French law, where parties had failed to suggest a controlling French rule); *Laker Airways, Ltd. v.*

Sabena, Belgian World Airlines, 731 F.2d 909, 950-52 & n.162 (D.C. Cir. 1984) (applying federal common law rule, rather than "interest balancing" approach suggested by defendant, because "there is no evidence that interest balancing represents a rule of international law"). The courts below therefore should have applied federal common law principles in determining whether McKesson was entitled to compound (rather than simple) prejudgment interest in compensation for having been deprived of its property for the past twenty-plus years.[13/]

Although this Court has yet to decide the question, the court of appeals have developed a rule of federal common law that includes a strong presumption in favor of compound prejudgment interest. Indeed, as the Seventh Circuit observed in *Amoco Cadiz*, "compound prejudgment interest is the norm in federal litigation." 954 F.2d at 1332 (citing *West Virginia v. United States*, 479 U.S. 305 (1987); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983); and *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989)). Since 1982, moreover, federal law has required that interest be compounded annually during the period after the court enters judgment, and the rationale for doing so applies equally to the period before judgment is entered. *See* 28 U.S.C. § 1961(b) (amended March 22, 1982, P.L. 97-164); *see also* S. Rep. No. 275 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 40 (using example showing application of compound interest in commenting on the need for prejudgment interest); *Gore, Inc. v. Glickman*, 137 F.3d 863, 868 (5th Cir. 1998) ("[p]rejudgment interest, *like any other interest*, is to compensate for the time value of

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13/ Calculated as of the date of the district court's judgment, the difference between the court's award with 9% simple prejudgment interest ($20,071,159) and an award with 9% compound annual prejudgment interest ($36,391,302) was approximately $16 million.

money.") (emphasis added).

Although district courts are of necessity afforded some discretion in determining whether to depart from the norm and award only simple interest, courts have long recognized that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975); *United States v. Taylor*, 487 U.S. 326, 336 (1988); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226-27 (1982); *see also Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) ("[t]he exercise of discretion contemplates reasoned decision making on the basis of relevant and appropriate considerations to the task at hand."); *Amoco Cadiz*, 954 F.2d at 1334 ("[d]iscretion is not unbridled; it is exercised under law"). Thus, in reviewing for abuse of discretion, an appellate court should consider whether the district court failed to consider a relevant factor, relied on an improper factor, and gave reasons that do not reasonably support its decision. *Rishell v. Jane Phillips Episcopal Memorial Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996); *Kickapoo Tribe*, 43 F.3d at 1497; *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 423 (1st Cir. 1991).

In this case, the court of appeals' review was deficient in several respects. First, the court neglected to consider whether the district court had failed to address factors relevant to its determination of the compound interest question. The proper exercise of discretion, under federal law principles, requires consideration of what is needed to "make the plaintiff whole" in light of the facts and circumstances of the particular case. *See, e.g. Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993); (reversing district court's refusal to award compound prejudgment interest); *Gorenstein Enters. v. Quality-Care*

U.S.A., Inc., 874 F.2d 431, 437 (7th Cir. 1989); *Dynamics Corp. v. United States*, 766 F.2d 518, 520 (Fed. Cir. 1985) (reversing award of simple interest and remanding for consideration of what just compensation required).

Here, it is clear from the district court's opinions that, to the extent it exercised its discretion at all in rejecting compound interest, it did so only in response to McKesson's motion for reconsideration and even then it did not consider what was required to make McKesson whole in light of the facts of this case. Instead, the district court deferred to decisions reached by courts or arbitrators in other cases. CA 17a. The court of appeals recognized that "federal common-law principles require courts to 'make the plaintiff whole,'" but it nevertheless held that the district court had not abused its discretion by failing to apply those principles here. PA 19a.

Consideration of the facts and circumstances of this case, which should have governed the exercise of discretion below, demonstrates that compound prejudgment interest was the appropriate award. The district court found that Iran's expropriation of McKesson's investment in Pak Dairy began in 1979 and was complete by April 1982. PA 105a-115a. Since then more than twenty years have passed, during which time McKesson has been deprived of its property and Iran has had the unfettered use of it. During that same period, McKesson paid compound interest to the banks from which it borrowed, and realized annual compound returns on its equity averaging more than 9%. L 303 – L 308; *see, e.g.*, *ITT Corp. v. United States*, 17 Cl. Ct. 199, 242 (1989) (taking judicial notice "that compound interest is a market or commercial reality for any corporation that does business in the United States"). Awarding only simple interest therefore penalizes McKesson, by putting it in a worse position than it would have been had Iran not expropriated its property, and rewards Iran with a windfall

for having successfully delayed final judgment. *See, e.g.*, *Amoco Cadiz*, 954 F.2d at 1231-32 (explaining that "[a]n injurer allowed to keep the return on this money has profited by the wrong."). Such a result, if it is allowed to stand, will send a clear message to foreign state litigants that, in U.S. courts, justice delayed is a money-making proposition.

Further guidance in this case is found in the investment protection clause of the Treaty of Amity, Art. IV(2), which requires "prompt payment of just compensation . . . representing the full equivalent of the property taken." This provision should be read in the context of the analogous rule of customary international law that "where property has been expropriated, just compensation must be paid 'at the time of the taking, or within a reasonable time thereafter with interest from the date of taking . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1986). The district court correctly found that under this rule, McKesson is entitled to prejudgment interest as an element of damages because "[m]oney today is not a full substitute for the same sum that should have been paid [20] years ago." PA 77a. Although the court of appeals found no fault with the district court's reliance on this rationale to support an award of prejudgment interest, it rejected McKesson's argument that the same reasoning ***requires*** compound interest in this case.[14/] PA 17a (the terms "just

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14/ In support of its appeal on the compound interest issue, McKesson submitted the expert opinion of Stephen M. Schwebel, former Judge and President of the International Court of Justice and a leading authority on international law. CA 29a. Judge Schwebel expressed the view that, under the Treaty of Amity, and under customary international law, the court should award compound interest where the taking occurred many years ago, "because an award of only simple interest does not 'represent the full equivalent of the property taken.'" Schwebel Op. ¶9 (citing *Starrett Housing Corp. v. Iran*, 16 Iran-U.S.C.T.R. 112, 251-54 (1987) (Holtzmann, J., concurring) (L 413, L 482 – L 484) (Treaty's

compensation" and "full equivalent" are "far too ambiguous to require awards of compound interest"). In deferring uncritically to the district court's exercise of discretion, such as it was, the court of appeals overlooked the obvious fact that, in this case, after 20 years of delay, an award of only simple interest clearly does not represent the full equivalent of the property taken.

In addition to ignoring the factors that it should have applied, both courts below also focused on an improper one: what the Claims Tribunal and other international courts "almost uniformly" or "invariably" have done with respect to prejudgment interest. PA 19a; CA 17a; *see Dynamics Corp.*, 766 F.2d at 520. The trial court in *Dynamics*, much like the district court here, had refused to award compound prejudgment interest because "traditionally, [reasonable and entire compensation] has always been limited to simple interest." *Id.* The Federal Circuit reversed, holding that the lower court should not have considered "what may have been 'traditional,'" and remanded the case for determination whether compound interest was appropriate in light of the facts and circumstances of the case itself. *Id.*; *see also ITT Corp.*, 17 Cl. Ct. at 239 (the court cannot rely on a "time-honored" practice that has neither been adequately examined or defended in terms of commercial realities). The international arbitration awards upon which the courts below focused shed no light at all on whether and when a federal court applying federal common law principles may or should depart from the norm and award only simple interest. Indeed, the courts' particular reliance on decisions by the Claims Tribunal and Foreign Claims Settlement Commission ("FCSC") is especially inappropriate in light of the unique circumstances, not present here, that shaped their policies

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requirement of "just compensation" mandates an award of compound interest in an expropriation case), & ¶ 24 (CA 34a, 52a).

with respect to prejudgment interest.[15/]

CONCLUSION

If the Court grants Iran's petition for a writ of certiorari, the conditional cross-petition also should be granted.

15/ The Tribunal's practice with respect to interest awards was heavily influenced by two factors. First, all Tribunal awards are payable promptly from a captive fund in The Netherlands, which was considered to be a substantial benefit not ordinarily available to private litigants against a sovereign defendant. Second, from the outset, at the Tribunal, it was recognized that substantial delays in the issuance of final awards were inevitable, without any fault or dilatory tactics by the respondents, due to the extremely large number of cases that had to be heard by only three chambers of arbitrators. *McCullough v. Minister of Post*, 11 Iran-U.S.C.T.R. 3, 30 (1988) (L 387, L 401); George Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, 477 (1996) (JA 1842). This consideration is unique to the Tribunal and clearly has no application in this case, where the substantial delay (at least since 1988, when the district court proceedings resumed) is attributable primarily to Iran's own litigating tactics. The FCSC's congressional mandate – to adjudicate a class of cases in which the claimants are required to share in a fixed and often inadequate fund – gives rise to similar policy considerations for awarding simple interest that, again, are inapplicable here.

Respectfully submitted,

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May 16, 2002

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APPENDIX 1

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 00-7157 **September Term, 2001**
82cv00220

Filed On: January 11, 2002 [650207]

Foremost Tehran, Inc., et al.,
Appellees

v.

Islamic Republic of Iran,
Appellant

Financial Organization for the Expansion of Ownership of Productive Units, et al.,
Appellees

Consolidated with 00-7263

BEFORE: Edwards, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of appellees/cross-appellants' petition for rehearing filed December 17, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Nancy G. Dunn
Deputy Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 00-7157 **September Term, 2001**
82cv00220

Filed On: January 11, 2002 [650206]

Foremost Tehran, Inc., et al.,
Appellees

v.

Islamic Republic of Iran,
Appellant

Financial Organization for the Expansion of Ownership of Productive Units, et al.,
Appellees

Consolidated with 00-7263

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellees/cross-appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Nancy G. Dunn
Deputy Clerk

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED Sept. 28, 2000
Nancy Mayer Whittington
Clerk
U.S. District Court

McKesson Corporation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action**
	)	**No. 82-00220**
The Islamic Republic of Iran, et al.,	)	**TAF**
	)	
Defendants.	)	
	)	

MEMORANDUM-OPINION

Presently pending is Plaintiff's motion for reconsideration pursuant to Fed. R. Civ. P. 59(e). Plaintiffs seek reversal of this Court's decision denying them pre-judgement compound interest and awarding only simple interest. For the reasons discussed below, Plaintiffs' motion is denied.

I. Discussion

Rule 59(e) motions "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice" Anyanwutaku v. Moore, 151 F.3d 1053, 1057 (D.C. Cir. 1998) (citation and internal quotations omitted); see also

Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Conversely, a "Rule 59(e) motion is not a second opportunity to present argument upon which the Court has already ruled, nor is it a means to bring before the Court theories or arguments that could have been advanced earlier." WC & AN Miller Companies v. U.S., 173 F.R.D. 1, 3 (D. D. C 1997), aff'd, Hicks v. U.S., 1999 WL 414253 (D.C. Cir. May 17, 1999).

In the Court's Memorandum-Opinion filed May 26, 2000, the Court determined the amount of damages for the expropriation of Plaintiffs' equity interest in the Iranian diary company, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy") and for their share of Pak Dairy's 1981 and 1982 dividends. See Memorandum-Opinion, Civ. A. No. 82-220 (May 26, 2000). After determining the value of the expropriated interests, the Court concluded that under customary international law, Plaintiffs were entitled to prejudgment interest calculated from the date of taking. Id. at 46-48. However, the Court denied Plaintiffs' request for compound interest. Id. at 50. After reviewing the state of customary international law and finding that the clear majority of international courts have historically awarded only simple interest, the Court concluded that in applying customary international law, it must follow this practice. Id. at 49-50.

Plaintiffs now move for reconsideration based on a recent arbitration decision by the International Centre for Settlement of Investment Disputes ("ICSID"), Compañia del Desarollo de Santa Elena, S.A. v. Republic of Costa Rica (hereinafter "Santa Elena"), ICSID Case No. ARB/91/1

(Washington, D.C. February 17, 2000).[1/] Plaintiffs argue that Santa Elena presents new authority on the availability and propriety of compound interest under international law and that it demonstrates that this Court's view of international law was erroneous.

In Santa Elena, the panel arbitrated a dispute over the correct amount of compensation which Costa Rica owed for property which it had expropriated. After determining the value of the property on the date of the taking, the panel also awarded interest from that date. It further concluded that interest should be calculated on a compound basis. The panel reviewed various sources of international law and found that "[n]o uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case." Id., Pl. Ex. 2 at ¶ 103. The panel concluded that the decision was left to the judgment of the ruling body, "taking into account all of the circumstances of the case at hand and especially considerations of fairness. . . ." Id. The panel then decided that in an expropriation case "where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due him," compound interest was necessary to ensure full compensation. Id. at ¶ 104. Plaintiffs now assert that this ruling demonstrates that they are entitled to compound interest as compensation for the expropriation of their interests in Pak Dairy.

1/ The Court was informed by Plaintiffs that the ICSID intended to publish the decision in its Spring 2000 reports. As of the date of this decision, however, the opinion in Santa Elena is not listed on the ICSID website as having been published. See http://www/worldbank.org/icsid/cases/conclude.html (listing Santa Elena as concluded but not published)

The Court finds that Plaintiffs' motion for reconsideration fails to satisfy the applicable standard for granting such motions. First, Plaintiffs have demonstrated no change in controlling authority. The recent decision of one arbitration panel of the ICSID does not, as Plaintiffs argue, constitute an "authoritative" determination of international law which this Court is bound to follow. Customary international law is a product of "the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis added). The Santa Elena decision thus presents relevant evidence of international law but must still be considered in light of the other evidence available. It thus cannot be "authoritative" in the sense that a controlling decision of law would be. For similar reasons, Santa Elena does not demonstrate that this Court committed clear error in following the practice of the vast majority of international cases and the explicit ruling of the Iran-U.S. Claims Tribunal, for these sources are also valid evidence of international law.

However, even considering the matter de novo, the Court is not persuaded that Santa Elena's view of international law is the correct one. To demonstrate that customary international law provides for compound interest, Santa Elena cites only one such award in the last sixty years, the Aminoil case. See Kuwait v. American Independent Oil Co. (Aminoil), 21 I.L.M. 976 (1982). Whether Aminoil actually awarded compound interest under international law is questionable, because the tribunal in that case had explicit authority to choose from various sources which law to apply on any particular substantive issue and it did not specify what law it relied on in awarding compound interest. Id. at 1000, 1042.

Even ignoring this ambiguity, however, Aminoil, does not support the existence of a customary rule. In determining customary international law, this Court is restricted to a "settled rule of international law" which has commanded the "general assent of civilized nations." The Paquete Habana, 175 U.S. 677, 700 (1900). "The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." Hamid v. Price Waterhouse, 51 F.3d 1411, 1418 (9th Cir. 1995) (citation and internal quotations omitted). "Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law." Id.

There is no dispute among the available cases or commentators that compound interest has rarely been granted, and when requested has almost always been expressly rejected. See M. Whiteman, III Damages in International Law 1997 (1943) ("Although in rare cases compound interest, or its equivalent, has been granted, tribunals have been almost unanimous in disapproval of its allowance. This is particularly true when the attention of the tribunal has been especially brought to the point.") In light of this almost uniform international jurisprudence rejecting compound interest, one or two cases to the contrary cannot establish the general assent of nations to such awards.

The panel in Santa Elena found additional support for an award of compound interest in the written opinions of two commentators. First, it noted the opinion of the late Professor F. A. Mann that under international law, "compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals." See Mann, F.A., Compound Interest as an Item of Damage, in F.A. Mann, Further Studies in International Law, 385 (1990). However, Dr. Mann apparently viewed international law under a different standard than the "settled rule" standard applicable

here, for he also conceded that Whiteman's contrary view that "compound interest is not allowable" was supported by numerous decisions. Id. at 377-78. While it might be appropriate to draw a customary rule from limited authority where such authority stands alone, it is far more questionable to do so where international tribunals and commentators have repeatedly expressed a contrary conception of the law. Given the majority practice rejecting an award of compound interest, it is difficult to conclude that a rule authorizing compound interest has become settled.

Indeed, Dr. Mann found that even the domestic laws of various "civilized countries" did not provide "unequivocal" evidence of the acceptance of compound interest. In countries such as England, France, Germany, Switzerland and the United States, he found that a law typically "does not authorize (but does not prohibit) the payment of compound interest." Id. at 381. He was therefore left to conclude not that compound interest is already accepted but that it "should be accepted wherever damages are allowed and should . . . be treated as a general principle of law." Id. at 383. He urged courts to "inaugurate 'a new conception of justice in accord with the highest knowledge and truest insight perceptible to the human mind.'" id. (citation omitted).

Even if Dr. Mann's insights reflect a better or more accurate view of compensation, this Court cannot follow them in absence of actual authority under customary international law to do so. As the Supreme Court has indicated, works of learned jurists and commentators "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The Paquete Habana, 175 U.S. at 700. Dr. Mann's opinion that a new rule is justified is thus not a persuasive basis for rejecting the established majority rule as the current state of international law.

The panel in Santa Elena cited to another commentator, Professor Gaetano Arangio-Ruiz who as Special Rapporteur of the United Nations International Law Commission on State Responsibility stated: "The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State." II Yearbook of the Int'l Law Commission, Part I, at 30 (1989). However, this opinion also appears to suffer the flaw noted above in connection with Dr. Mann. While Dr. Arangio-Ruiz as commentator may have indicated that compound interest should be awarded, it is undisputed that as an actual jurist of the Iran-U.S. Claims Tribunal, he has repeatedly signed on without any dissent to opinions awarding only simple interest, indicating that his view of what the law should be and what it actually is are not coextensive. See, e.g., Shahin Shaine Ebrahimi v. Government of the Islamic Republic of Iran, Award No. 560-44/46/47-3, ¶ 179 (October 12, 1994) (Westlaw/Int-Iran) (finding liability for expropriation and awarding simple interest from the date of taking).

In sum, this Court finds that Santa Elena and the sources it relies upon are not persuasive evidence of customary international law and that the law as evidenced by the majority of relevant cases and as expressed most recently by the Tribunal is the applicable rule.

Plaintiffs argue that the decisions of the Tribunal which reject compound interest are distinguishable from Santa Elena and the instant case. Plaintiffs assert that the Tribunal based its denial of compound interest not on customary law but on the special features of the Tribunal and the Algiers Accords. Plaintiffs cite McCollough & Co. v. Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 (April 22, 1986), reprinted at 11 Iran-U.S. Cl. Trib. R. 3 (1988). However, Plaintiffs overlook the fact that the Tribunal has explicitly rested in practice of denying

compound interest on international law. See, e.g. R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran, Award No. 145-35-3 (August 6, 1984), reprinted at 7 Iran-U.S. Cl. Trib. R. 181, 191 (1986). Conversely, although McCollough did rely on the Algiers Accords and the specific features of the Tribunal in connection with determining an award of interest, it did so in order to determine the rate of interest and the date from which interest was to run, not the method of accumulation. McCollough, ¶ 102, 11 Iran-U.S. Cl. Trib. R. at 30. Indeed, applying McCollough's reasoning to the issue of compound interest leads to a contradiction, for one of the "specific features" of the Tribunal which concerned it was the likelihood that claims would be long delayed before resolution. Id. However, Plaintiffs themselves argue that cases of long delay present a greater, not a lesser justification for compound interest. Thus, had the Tribunal been motivated by concerns over delay, it would have awarded compound interest. The Court concludes that the Tribunal's practice of awarding only simple interest is based not on concern over delay but rather on the Tribunal's understanding of customary international law.[2/]

2/ Plaintiffs have noted that this Court allowed itself to be guided by the practice of the federal courts in determining the appropriate rate of interest but not in determining the method of calculation. This disparity in treatment is directly reflected in the reasoning of McCollough. When addressing whether to grant compound interest, the Tribunal found that "[t]here are few rules within the scope of the subject of international law that are better settled than the one that compound interest is not allowable." R.J. Reynolds Tobacco Co., 7 Iran-U.S. Cl. Trib. R. 181, 191 (quoting M. Whiteman, III Damages in International Law 1997 (1943)). In contrast, when the Tribunal in McCollough considered how to determine an appropriate rate of interest, it expressly relied on the "discretion

(continued).

Plaintiffs also argue, as did the panel in Santa Elena, that the customary practice of awarding only simple interest applies primarily in cases of personal injury or breach of contract and that "[t]he same considerations do not apply to cases relating to the valuation of property or property rights." Santa Elena at ¶ 97. However, Santa Elena failed to provide any evidence that international law reflects this distinction. The only support provided by the panel was a quotation allegedly drawn from the Tribunal decision in Flexi-Van Leasing, Inc. v. Iran which the panel erroneously cited at 9 Iran-U.S. Cl. Trib. R. 206. However, neither Flexi-Van, Decision No. DEC 54-36-1 (Dec. 18, 1986), reprinted at 13 Iran-U.S. Cl. Trib. R. 324 (1988), nor Int'l Technical Products Corp. v. Iran, the case actually reported at 9 Iran-U.S. Cl. Trib. R. 206 (1987), address the issue of compound interest at all. Further, the quotation Santa Elena relied upon, most likely drawn from McCollough, merely states correctly that "occasionally compound interest has been awarded." McCollough & Co., at ¶ 96, 11 Iran-U.S. Cl. Trib. R. at 28. It offers no support for Santa Elena's distinction between property and contract cases.

That distinction is also not supported by the cases which award compound interest or the far more numerous cases which do not. The case most often cited as awarding compound interest is, as noted above, Aminoil. However, the arbitration panel in Aminoil awarded damages for both contract and property claim and then provided for compound interest on damages without making any of the distinctions suggested by Santa Elena.

Conversely, numerous expropriation cases have been reported which award only simple interest or affirmatively reject and award of compound interest. For example, in

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recognised [sic] by international law." McCollough, ¶ 103, 11 Iran-U.S. Cl. Trib. R. at 30.

Norwegian Shipowner's Claims (Norway v. U.S.), 1 R. Int'l Arb. Awards 307 (1922), the United States and Norway submitted to arbitration the claims of Norwegian citizens that the United States had expropriated their vessels. The tribunal awarded the shipowners damages including interest. In awarding interest, the tribunal provided a number of reasons which it found sufficient to justify an award of simple interest:

> the Tribunal has taken into consideration the facts that the United States have had the use and profits of the claimant's property since the requisition of five years ago, and especially that the sums awarded as compensation to the claimants by the American Requisition Claim Committee have not been paid, finally that the United States have had the benefit of the progress payments made by Norwegians with reference to these ships

Id. at 341. However, the tribunal in Norwegian Shipowners expressly held that these considerations were insufficient to justify an award of compound interest. It stated:

> The claimants have asked for compound interest with half-yearly adjustments, but compound interest has not been granted in previous arbitration cases, and the Tribunal is of the opinion that the claimants have not advanced sufficient reasons why an award of compound interest, in this case, should be made.

Id. see also V. Hackworth, Digest of Int'l Law, 736 (1943) (reprinting quotations)[3/]

Further, the jurisprudence of the Iran-U.S. Claims Tribunal is replete with examples of expropriation awards providing only simple interest. Most strikingly, in Starrett Housing Corp. v. Islamic Republic of Iran, Award No. 314-24-1, ¶ 370-71 (August 14, 1987), 16 Iran-U.S. Cl. Trib. R. 112, 234-35 (1988), the majority rejected an award of compound interest despite strong arguments for such an award coming from both the claimants and a concurring opinion by Judge Holtzmann. See id., 16 Iran-U.S. Cl. Trib. R. at 251-54 (Holtzmann, concurring in part and dissenting in part). Starrett thus confirms that the Tribunal rejected compound interest in property as well as contract cases.

The distinction between property and contract claims

3/ The reference in Norwegian Shipowners to "special circumstances" that might justify compound interest has been repeatedly lached onto by those seeking to demonstrate that compound interest is not entirely unavailable. See II Yearbook of the Int'l Law Commission, Part I, at 30 (1989). The difficulty with relying upon this language is not merely that the "special circumstances" are never identified, but that the facts of Norwegian Shipowners establish that the expropriation of a money-earning property is not one of those special circumstances. Thus, it is notable that in British claims in the Spanish Zone of Morocco, (reported at II Yearbook of the Int'l Law Commission, Part 1, at 30 (1989)), the arbitrator also made reference to "particularly strong and quite special arguments need[ed] to be advanced to accept" compound interest, but concluded that "[s]uch arguments do not appear to exist . . . ." These references to special circumstances thus offer little basis for the entitlement to compound interest which Santa Elena found to exist in virtually any expropriation case.

is also absent from the jurisprudence of the Foreign Claims Settlement Commission ("Commission"), a quasi-judicial body of the United States government authorized to adjudicate certain categories of international claims. See 1998 FCSC Ann. Rep. at 4, available at http://www.usdoj.gov/fcsc/annrep98.html; see also 1993 FCSC Ann. Rep. at 6. Historically, the Commission has awarded only simple interest in expropriation claims despite the passage of long periods of time between the taking and the award. See Shanghai Power Co. v. U.S., 4 Cl. Ct. 237, 239 (Cl. Ct. 1983) (noting that Commission awarded simple interest on claim that People's Republic of China had expropriated power company), aff'd, 765 F.2d 159 (Fed. Cir. 1985); Maria A. Stevens, reprinted at 1998 FCSC Ann. Rep. at Exh. II (finding Albania liable for expropriation and awarding simple interest "[i]n accordance with applicable principles of international law and its decisions in previous claims programs"). Of particular note are the Commission's adjudications of claims against Iran. Specifically, in 1990, the Commission was given authority to adjudicate small claims lodged against Iran following the Revolution.[4/] The

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4/ These small claims were initially under the jurisdiction of the Iran-U.S. Claims Tribunal. However, in 1985, Congress passed a law giving the Commission stand-by jurisdiction over these claims pending a global settlement between Iran and the United States. On May 13, 1990, the United States and Iran entered into an agreement which provided for the espousal of all small claims by the United States, extinguishing Iran's liability, in return for which Iran would pay a lump sum of $105 million. Following the agreement, the Commission's jurisdiction to adjudicate these claims became effective. The $105 million was then used to establish a fund for the satisfaction of any awards by the Commission. See Abrahim-Youri v. U.S., 139 F.3d 1462, 1464 (Fed. Cir. 1997) (summarizing history of the Commission's adjudication of Iranian small claims).

Commission's published decisions (available in its Annual Reports to the Congress) indicate that in ruling on these small claims, it uniformly awarded only simple interest, even in claims of expropriation. See, e.g., Darioush, Diana & Daniel Elghanayan, Dec. No. 1083, reprinted at 1993 FCSC Ann. Rep. 11, 18 (awarding damages for expropriation and holding that "[i]n accordance with Tribunal precedent, recognized principles of international law, and its decisions in previous claims programs, the Commission further concludes that the claimants are entitled to interest as part of their awards, amounting to 10 percent simple interest per annum . . .") (emphasis added); Nouriel Aryeh, Samuel Aryeh, Ouriel Aryeh & Emanuel Aryeh, Dec. No. IR-2365; reprinted at 1994 FCSC Ann Rep. 19, 38 (same); Angel Murad, Dec. No. IR-2226, reprinted at 1994 FCSC Ann. Rep. 59, 65 (same). Based on all of these authorities, the Court must reject Santa Elena's asserted distinction between contract and property cases, and conclude that in all cases, customary international law does not provide for compound interest.

Finally, even if customary international law authorizes an award of compound interest at the discretion of the awarding body, this Court finds that the almost uniform practice of awarding only simple interest is a relevant and compelling consideration in the exercise of that discretion. The cases before the Tribunal and this country's own Commission are particularly relevant since both addressed claims of U.S. citizens against Iran for expropriations which occurred more than 10 years previously, claims directly comparable to Plaintiff's own. Both bodies, acting under international law, awarded only simple interest. This Court finds that these cases and the other authorities supporting their practice offer persuasive guidance and accordingly, even with discretion, this Court concludes that simple interest is the appropriate award.

Accordingly, Plaintiffs' motion is denied. An appropriate order will accompany this decision.

Date: September 28, 2000

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED Sept. 28, 2000
Nancy Mayer Whittington
Clerk
U.S. District Court

McKesson Corporation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action**
	)	**No. 82-00220**
The Islamic Republic of Iran, et al.,	)	**TAF**
	)	
Defendants.	)	
	)	

ORDER

For the reasons discussed in the accompanying Memorandum-Opinion, it is hereby **ORDERED** that Plaintiff's Motion for Reconsideration (505) is DENIED.

Date: September 28, 2000

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED Mar. 17, 1999
Clerk, U.S. District Court
District of Columbia

McKesson Corporation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action**
	)	**No. 82-0220**
The Islamic Republic of Iran, et al.,	)	**TAF**
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

The Islamic Republic of Iran (Iran) has filed a Third Motion For Summary Judgment, and Second Motion for Reconsideration of this Court's granting of Plaintiffs' Motion for Summary Judgment on the Issue of Liability and denial of Iran's Motion for Summary Judgment. The issue of liability has been decided by the Court's order of June 23, 1997, and reaffirmed by the Court in its January 29, 1998, Memorandum Opinion and Order.

Iran, now for the third time, contends that Iranian law requires McKesson to send a representative to Pak Dairy in Iran in order to collect is dividends.

McKesson states in its opposition that Iran is merely restating contentions that have been twice considered and

overruled by this Court and that it fails to show any reason why the Court should reconsider a judgment it has already considered twice and affirmed. A motion for reconsideration must be based on the discovery of new evidence or on a clear error of fact or law. Iran relies on a fourth affidavit from its legal expert, Dr. Fakhari. Examination of Dr. Fakhari's affidavit reveals that it contains no evidence to show Pak Dairy's Board of Directors ever officially adopted a "come to the company" requirement in accordance with Pak Dairy's Articles of Association. The affidavit contains no references to Iranian law requiring a shareholder to "come to the company" for dividends.

The Court has found that Iran controlled Pak Dairy, that dividends were declared by Pak Dairy for the years in issue, that distribution of dividends to shareholders is obligatory under Pak Dairy's Articles of Association, that Pak Dairy refused to distribute dividends to McKesson, and that Pak Dairy has never rescinded its decision to withhold payments of dividends to McKesson. It is undisputed in this case that there is no Iranian statute or other legal authority mandating the "come to the company" practice, and Dr. Fakhari has not cited any such authority in his four affidavits.

Iran asserts that it has requested Park Dairy to produce any minutes of Pak Dairy's Board of Directors in which a "come to the company" policy was imposed. Iran contends that its failure to produce such evidence to substantiate its claimed "come to the company" requirement should not be held against it since Pak Dairy has been uncooperative in producing documents. However this Court has held that Iran has a principal agent relationship with Pak Dairy and controls Pak Dairy. Therefore the Court gives little credence to Iran's contention. In its 1997 opinion the Court found that it would have been futile for McKesson to send an authorized representative to Tehran to claim its dividends relying in part on the findings of the Claims

Tribunal. In Footnote #3 of its Memorandum Opinion filed on January 29, 1998, the Court stated that it may in fact have overrelied on the Claims Tribunal opinion in reaching a conclusion that it would have been futile for McKesson to attempt to comply with the alleged "come to the company" requirement. However upon further consideration the Court does find that based on the entire record in this case, including the opinion of the Claims Tribunal, it indeed would have been futile for McKesson to attempt to comply with the alleged "come to the company" requirement.

Conclusion

Iran has failed to meet its burden of presenting newly discovered evidence or demonstrating a clear error of law or fact which would justify a reversal of the Court's entry of partial summary judgment in this case. Therefore Iran's Third Motion for Summary Judgment and Second Motion for Reconsideration will be denied.

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

So Ordered: 3-17-99

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED Jan. 29, 1998
Clerk, U.S. District Court
District of Columbia

McKesson Corporation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action**
	)	**No. 82-00220**
The Islamic Republic of Iran, et al.,	)	**(TAF)**
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

This matter came before the Court at a hearing on January 8, 1997. Pending before the Court is Iran's second motion for summary judgment or, in the alternative, for reconsideration. After considering the applicable law and the arguments set forth in the parties' memoranda and at the hearing, the Court will deny Iran's motion.[1/]

1/ As a procedural matter, the Court will treat Iran's motion as one for reconsideration. Since the court has already ruled on the precise issue –Iran's liability–on which Iran seeks summary judgment, it is inappropriate to treat Iran's filing as a "second motion for summary judgment." Nonetheless, even if such a motion were appropriate, the Court would deny the motion on the merits, for the reasons set forth in this opinion.

I. Background

At issue in this case is the plaintiffs' ("McKesson") claim that the defendants ("Iran") have expropriated McKesson's interest in the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"), a dairy located in Iran. On June 23, 1997, the Court granted partial summary judgment in favor of McKesson on the issue of Iran's liability. Applying both customary international law and the Treaty of Amity between the United States and Iran, the Court concluded that, while McKesson still retains formal title to its shares in the dairy, Iran's interference with McKesson's interest in the dairy amounts to an expropriation.[2/] Central to its ruling on Iran's liability was the Court's conclusion that, from 1981 to the present, Iran has wrongfully withheld McKesson's dividends.

The basis for Iran's pending motion is an argument that the Court already considered and rejected when it found Iran liable for expropriating McKesson's interest in Pak Dairy. Specifically, Iran argues that there has been no expropriation because McKesson can get its dividends anytime it wants, if only it will follow the proper procedure, i.e., by sending an authorized representative to Pak Dairy to collect the dividends in person. According to Iran, this procedural requirement is one that the dairy's board of directors has officially adopted and that therefore has the force of a "legal requirement," in the sense that, under Iranian law, McKesson would not be able to maintain a cause of action for the taking of its dividends unless it had first sought payment of the dividends by "coming to the company." Since it is undisputed that McKesson has never attempted to comply with the "come to the company"

2/ Because it found liability on those grounds, the Court did not decide whether Iran is also liable under Iranian law.

requirement, Iran concludes that McKesson cannot show that its dividends have been wrongfully withheld.

The Court's June 23 opinion directly addressed Iran's argument that the dairy has a "come to the company" requirement for collecting dividends. First, the court noted that the dairy's Articles of Association do not specify any particular method for paying or collecting dividends. Instead, Article 57 provides merely that "should the general meeting pass no resolution regarding the mode of payment of dividends, the board of directors may determine the mode of payment." Second, the Court concluded that Iran had at best established that the "come to the company" policy was a custom or practice of the dairy, not a legal requirement. Third, the Court concluded that, even if a "come to the company" requirement existed, it was "undisputed" that McKesson did not know about it. And fourth, the Court concluded that it would have been futile for McKesson to have attempted to comply with any such requirement. In explaining this last point, the Court noted that the Claims Tribunal found that Pak Dairy had "never specifically retracted" a May 27, 1980 telex that stated that the dairy "can not pay any sums of money for any reason to foreign shareholders."[3/]

In support of its request for reconsideration, Iran offers no new factual information. Instead, Iran relies on the following: a clarification of legal arguments it had made in

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3/ In support of its motion for reconsideration, Iran contends that the Court's conclusion on the futility issue was in error. The Court acknowledges that it may in fact have over relied on the Claims Tribunal's opinion in reaching the conclusion that it would have been futile for McKesson to attempt to comply with the alleged "come to the company" requirement. However, since Iran has failed to demonstrate that a legally binding requirement exists, the Court need not resolve the issue of whether it would have been futile for McKesson to "come to the company" to collect its dividends.

support of its earlier summary judgment motion; the third affidavit of its legal expert, Dr. Amir Hossein Fakhari; and the third affidavit of the dairy's head accountant, Alireza Dadyar. In their affidavits, Fakhari and Dadyar basically reaffirm points they made in earlier affidavits, i.e., that the dairy had adopted the dividend-payment procedure described above and that the procedure has the force of a legal requirement.

II. Analysis

Iran has yet to demonstrate that there is a genuine issue of material fact with regard to its expropriation of McKesson's interest in Pak Dairy. Despite its repeated efforts, Iran has not presented evidence that establishes that the dairy's board of directors ever formally adopted the alleged "come to the company" requirement for collecting dividends or that any such requirement, assuming it exists at all, has the force of law. Since the Court remains convinced that there is no justification for the withholding of McKesson's dividends in Pak Dairy, it will not reconsider its decision to grant McKesson partial summary judgment on the issue of liability.

In all of its voluminous filings in this case, Iran has yet to offer a single piece of contemporaneous evidence that establishes that Pak Dairy's board of directors ever officially adopted a "come to the company" requirement. It also has failed to demonstrate that McKesson was properly on notice of such a requirement. Two key documents that Iran cites as establishing these points are in fact of little help to its position. The first of those documents, a November 11, 1981 telex that the dairy sent to McKesson, includes this cryptic reference to the alleged "come to the company" requirement:

> As regards the payment of your dividend, this company has repeatedly announced its readiness for taking proper measures but you have not taken

> appropriate action in this regard. If you really mean to settle this issue, you can introduce your plenipotentiary representative to us so that necessary steps may be taken according to the current regulations.

Obviously, this telex does not spell out any policy, nor does it make any reference to official board action. The other document, a brief Iran filed before the Claims Tribunal on December 6, 1983, is even more unhelpful to Iran's position. In that brief, Iran wrote: "The triple companies [McKesson] never adopted definite arrangements to collect dividends accruing on their shares in Pak Dairy because *the normal routine* in Pak Dairy was that the shareholder used to introduce a representative to collect the checque for the dividend . . . . (Iran's Exhibit 11 at 22-23) (emphasis added). If anything, this passage only lends further support to the Court's conclusion that the alleged "come to the company" requirement is really just a custom or practice. Again, Iran did not support its brief with any documentation demonstrating that the board had officially adopted a binding requirement.

The affidavits Iran has submitted in support of the pending motion are similarly devoid of any documentation to support Iran's contention that the dairy's board of directors ever formally adopted the "come to the company" policy as a binding requirement. In fact, in his most recent affidavit, Mr. Dadyar, the dairy's accountant, states that, "[a]lthough not obligated to do so, Pak Dairy occasionally made exceptions to its requirement that the dividends be collected [according to the "come to the company" requirement]. However, Foremost never formally requested such an exception in 1981 or thereafter and Pak Dairy never made such an exception to the requirement for Foremost." Putting aside the question of whether it is plausible for Iran to claim that McKesson has never asked for an exception to the dairy's "come to the company" policy, Dadyar's

statement falls far short of supporting the proposition that the policy is a formal, binding requirement.

Despite its claims to the contrary, Iran has not offered evidence sufficient to create a genuine issue of material fact with regard to whether it has expropriated McKesson's interest in Pak Dairy. Therefore, the Court will adhere to its decision to grant partial summary judgment in favor of McKesson on the issue of liability.

III. Conclusion

For the reasons given above, it is hereby ORDERED that Iran's second motion for summary judgment or, in the alternative, for reconsideration, is hereby DENIED.

Date: 1/29/98

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

McKESSON HBOC, INC., et al.,	)	
Appellees/	)	
Cross-Appellants	)	
v.	)	**No. 00-7263**
THE ISLAMIC REPUBLIC OF IRAN	)	
Appellants/	)	
Cross-Appellees,	)	
THE FINANCIAL ORGANIZATION FOR THE EXPANSION OF OWNERSHIP OF PRODUCTIVE UNITS, et al.,	)	
Appellees	)	

EXPERT OPINION OF STEPHEN M. SCHWEBEL

May 8, 2001

EXPERT OPINION OF
JUDGE STEPHEN M. SCHWEBEL

1. My name is Stephen M. Schwebel. I have been asked by McKesson HBOC and the Overseas Private Investment Corporation to give an opinion on a question of international law in connection with the above-captioned case. I served as a Judge of the International Court of Justice in The Hague from 1981 to 2000, and as President of that Court from 1997 to 2000. I have been appointed as chairman or arbitrator in twenty-nine international arbitrations, taught international law at Harvard Law School and the School of Advanced International Studies of The Johns Hopkins University, served as a member and Special Rapporteur of the United Nations International Law Commission and as Deputy Legal Adviser of the United States Department of State, and have written three books and some 150 articles in the field of international law. The Chairman of the Administrative Council of the International Centre for the Settlement of Investment Disputes (ICSID) has appointed me a member of the ICSID Panel of Arbitrators and of the Panel of Conciliators for a six-year term expiring in 2006. My qualifications are more fully listed in the attached curriculum vitae.

2. I have been requested to give my opinion on the question of whether, in applying public international law, the determination of the type of interest payable by a State and State-owned or affiliated agencies and companies for expropriation to a foreign investor, who has successfully maintained a claim in a U.S. court against that State and its companies for expropriation, must result in simple prejudgment interest or whether compound interest may, consistently with international law, be awarded.

3. There is no multilateral treaty that governs the issue. Nor is there a treaty in force between the Islamic Republic of Iran, the State in question, and the State of which the foreign investor is a national, the United States of America, which specifically addresses the matter of interest. The Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran of 1956, which the International Court of Justice and the Iran-United States Claims Tribunal have held to be in force, does not expressly refer to awards of interest. It does however provide in Article IV, paragraph 2 that:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken.

4. The United States District Court for the District of Columbia has held that there was a taking by Iran and its co-defendants of the property of the Plaintiffs, and that compensation shall, in accordance with the Treaty of Amity and customary international law, be paid by the Defendants which "shall represent the full equivalent of the property taken." *Memorandum Opinion of May 26, 2000* at 46-47.

5. The full equivalent of the value of the property taken by the Defendants from the Plaintiffs requires awarding not only damages for the expropriation of the

Plaintiffs' equity interest and their share of dividends, but, as the District Court determined, in applying customary international law, prejudgment interest calculated from the date of taking. However, the Court denied the request of the Plaintiffs for compound interest. Ibid., at 48. "After reviewing the state of customary international law and finding that a clear majority of international courts have historically awarded only simple interest," the Court concluded that "in applying customary international law, it *must* follow this practice" Ibid., at 2; emphasis supplied.

6. In my opinion, the District Court in construing and applying international law to hold that an award of compound interest was impermissible in this case erred on two counts. First, it failed in respect of interest to apply the specification of Article IV, paragraph 2 of the Treaty of Amity requiring that compensation "shall represent the full equivalent of the property taken." Second, it misinterpreted and misapplied the customary international law that it held to be governing. It is my opinion that, under a correct construction and application of the Treaty and of customary international law to this case, compound interest is not only an available remedy but an appropriate and necessary component of the damages to which the Court held that the Plaintiffs are entitled.

I. Application of the Treaty of Amity

7. It is established in international jurisprudence, as reflected in the terms of the Statute of the International Court of Justice (to which Iran and the United States are Parties) that, before resorting to customary international law, a court shall apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States" (Statute of the International Court of Justice, Article 38, paragraph 1 (a). As pointed out by Sir Robert Jennings (former President of the International Court of Justice) and Sir Arthur Watts (formerly The Legal

Adviser of the Foreign and Commonwealth Office of the United Kingdom),"an international court is bound in the first instance to consider any applicable treaty provisions binding upon the parties..."(*Oppenheim's International Law,* Ninth Edition, Volume 1, Peace, 1992, at 25-26.) Where the standard set out in a treaty between the States concerned and the standard found in customary international law differ, the treaty standard governs. "As between the parties, the provisions of a treaty prevail over any inconsistent rule of customary international law..." (*Ibid.,* at 1249.) In applying international law, the District Court should have followed these principles, which are embodied in Section 102 of the *Restatement of the Foreign Relations Law (Third) of the United States.* "Unless the parties evince a contrary intention, a rule established by agreement supersedes for them a prior inconsistent rule of customary international law." *Ibid.* at 27-28, Comment j. The Treaty of Amity is an international convention which establishes the rule, expressly recognized by Iran and the United States, that compensation for property taken by either Party "shall represent the full equivalent of the property taken."

8. It is well known that, as a matter of commercial reality and predominant practice, companies that borrow from banks, as large companies generally do, pay compound interest (see the authorities quoted below). It is equally a matter of commercial reality and predominant practice that debts owed to a company must be repaid with compound interest if the creditor company is to receive "the full equivalent" of the debt. During the period of non-payment, the creditor company will typically have borrowed paying compound interest. If interest on its debts to its creditors is compounded, but interest on debts owed to it carry only simple interest, the company sustains a loss that grows increasingly with the passage of time. As was pointed out in the most recent survey of the subject, published in the *American Journal of International Law:*

> In the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest. John Y. Gotanda, "Awarding Interest in International Arbitration," 90 *A.J.I.L.* 40, 61 (1996).

See also, F.A. Mann, "Compound Interest as an Item of Damage in International Law," 21 U.C. Davis L.R. 577 (1988):

> It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest...many are compelled to borrow from banks and therefore must pay compound interest...on the basis of compelling evidence compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals. (*Ibid.*, at 585, 586.)

9. Applying this reasoning to construe the "just compensation" which is to be promptly paid and which "shall represent the full equivalent of the property taken", pursuant to Article IV, paragraph 2 of the Treaty of Amity, it follows that, if a federal court in the United States is to give effect to the treaty obligations of the Parties to a treaty, one of which is the United States, i.e., the Treaty of Amity, it shall award not simple but compound interest in order to provide "the full equivalent of the property taken..." In my opinion, a U.S. federal court, adjudicating an expropriation

claim based upon this provision of the Treaty of Amity, is bound to award compound interest as part of the compensation for the expropriation held to have occurred in 1982, because an award of only simple interest does not "represent the full equivalent of the property taken."

II. The Standard under Customary International Law

10. Customary international law properly applied to the instant matter also should result in the award of compound interest. The District Court's contrary conclusion, that it *must* award only simple interest, was based on the Court's erroneous finding of a rule of customary international law requiring that result.

11. A rule of customary international law evolves from the practice of States and is reflected in the judgments of courts and tribunals passing upon questions of international law. This practice must come to be viewed by States as giving rise to *opinio juris* of the international community that the practice has attained a constancy and uniformity that sustains the conclusion that it is not mere usage but a matter of legal obligation. In my opinion, the rule of simple interest only, which the District Court held to apply under customary international law, is not the rule at all. To the contrary, it is now the rule that the court or tribunal deciding a claim for damages governed by customary international law should award compound interest where, in the exercise of appropriate discretion, it is warranted.

12. Customary international law is made, and unmade, by practice. A rule of customary international law may, at one time, be settled, but divergent international practice may unsettle it. By way of example, for many years, the three-mile limit of the territorial sea was generally accepted as customary international law. But more expansive seaward claims on the part of an increasing

number of States unsettled what had been regarded as settled, and made it impossible to codify that custom in the great law-of-the-sea conventions concluded in the last fifty years of the Twentieth Century. On the contrary, in reflection of the change in what had been customary international law, Article 3 of the Third United Nations Convention on the Law of the Sea now provides that, "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles..."(United Nations Convention on the Law of the Sea of 10 December 1982.) A State need not exercise that right; it may choose to adhere to a lesser limit, and some States do so adhere. But it may lawfully establish a twelve-mile territorial sea, in clear recognition of the fact that what was generally seen as governing customary international law on the matter in the early decades of the Twentieth Century no longer applies; custom had become unsettled through challenging practice, which latter practice in due course came to be codified as the international law of the matter.

13. The District Court gave considerable weight to a statement 58 years ago by a then Assistant to the Legal Adviser of the United States Department of State, asserting that the disallowance of compound interest was at that time a settled rule of international law. 3 Marjorie M. Whiteman, *Damages in International Law* (1943), at 1997. If that was a settled rule in 1943, however, it has become unsettled since. The practice to which Miss Whiteman referred no longer "is in accord with a constant and uniform usage," if ever it was. Contemporary practice is inconstant and diverse. Some practice, largely routine and sparse in analysis and justification, still tends to award simple interest; this is exemplified in awards of the Iran-United States Claims Tribunal. At the same time, the Iran-United States Claims Tribunal itself has acknowledged that practice is divided. Thus in McCullough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone, The National Iranian Oil Company, and Bank Markazi (1986), where the claimant

sought interest compounded annually, the Tribunal observed that, "Most awards allocate only simple interest, but occasionally compound interest has been awarded." 11 Iran-U.S. CTR 3, at n. 96. The Tribunal emphasized "the discretion it is empowered to exercise in this field" (*Ibid.*,n. 99).

14. More than this, several important, contemporary arbitral awards (discussed below), rendered by some of the leading international lawyers of this era, have awarded compound interest, and some of these awards cogently analyze and justify so doing. These awards have built upon the criticism of awarding only simple interest developed by three international lawyers of exceptional authority, the late Dr. F.A. Mann (who is quoted above and below), the late Dr. J. Gillis Wetter (whose writings are referred to in a case quoted below), and Professor Gaetano Arangio Ruiz.

15. Professor Arangio Ruiz, after a meticulous examination of the international cases, and writing in his capacity as Special Rapporteur on State Responsibility of the United Nations International Law Commission, concluded in 1989 that compound interest is an available remedy under customary international law and should be awarded in appropriate cases to provide full compensation for the damage suffered. (*Yearbook of the International Law Commission 1989, Volume II, Part 1.*) The Commission has been engaged in the codification of the law of State responsibility for decades, a process nearing its end. That process embodies careful examination of the components of existing law with a view towards its codification, as well as consideration of reform of the law with a view towards embodying elements of progressive development in the conclusions reached by the Commission. On the issue of compound interest, Professor Arangio Ruiz wrote:

105. Although a majority of negative decisions on compound interest may seem to emerge, international jurisprudence is, in the opinion of the Special Rapporteur, not really conclusive in the negative sense:

(a) Among the negative decisions one should distinguish:

(i) the decision that simply adjusts an ill defined negative orientation of previous case–law (*Christern and Company*):

(ii) decisions which, while recalling previous case-law, indicate however that in special circumstances the mechanism of compound interest could be useful in fulfilling the requirement of full compensation (*British claims in the Spanish Zone of Morocco* and *Norwegian Shipowners' Claims*);

(iii) the decision that considers that in the specific case the compound interest mechanism would result in a sum exceeding by far the actual *lucrum cessans (Portuguese Colonies)*;

(iv) the decision which, on the contrary, considers that compound interest, while acceptable in principle, would lead in the specific case in insufficient compensation (*Fabiani*).

(b) As for the cases in which compound interest was awarded, the lack of motivation would seem to suggest that compound interest was considered to be an essential, non-controversial element of reparation by equivalent.

The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it Is proved that it is indispensable in order to ensure full compensation for the damage suffered by the insured State. (*Ibid.* at 30.)

16. Professor Arangio Ruiz's successor as Special Rapporteur of the Commission is Professor James Crawford. He surveyed the ground once again, in the light of State comments on and Commission consideration of the conclusions of Professor Arangio-Ruiz, and concluded that the Commission's draft articles should include no provision on the character of interest; rather questions of awarding compound interest are "to be resolved on a case-by-case basis". Third Report on State Responsibility, *Yearbook of the International Law Commission*, Part II (2000).

17. *In the Matter of an Arbitration between the State of Kuwait and the American Independent Oil Company (Aminoil),* an eminent Tribunal, composed of Professor Paul Reuter, President, Professor Hamed Sultan and Sir Gerald Fitzmaurice, in 1982 held that Aminoil was entitled to an award of $83,000,000, "at a compound rate of 17.5% annually." The Tribunal did not explain its choice of a compound rate. But what is clear is that the choice was not uninformed. Professor Reuter, a member of the United Nations International Law Commission, was then widely

recognized as the leading French international lawyer. Professor Sultan was an experienced international arbitrator and leader of the Cairo Bar. Sir Gerald Fitzmaurice, for years The Legal Adviser of the British Foreign Office, had served both as a Judge of the International Court of Justice and a Judge of the European Court of Human Rights. They awarded compound interest in a case in which the Tribunal was authorized to determine the law governing the substantive issues between the Parties, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world. While the Tribunal's terms of reference authorized it to award interest, they did not specify whether interest was to be simple or compound. But compound interest was awarded. *Kuwait v. Aminoil*, 66 International Law Reports 518, 613 (1982).

18. *In the Matter of an Arbitration between Compañia del Desarrollo de Santa Elena, S.A. and the Republic of Costa Rica, 38 International Legal Materials 1317 (2000),* a comparably distinguished international tribunal in February 2000 awarded compound interest and persuasively justified its so doing in the following terms:

> 96. Claimant claims that it is entitled to an award of compound interest on the value of the property in 1978, calculated from the date of the expropriation. Respondent argues that no interest is due or, if interest is due, then Claimant is entitled to simple interest only a nominal rate.
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> 97. Even though there is a tendency in international jurisprudence to award only simple interest, this is manifested principally in relation to cases of injury or simple breach of contract. The same considerations do not apply to cases relating to the valuation of

property or property rights. In cases such as the present, compound interest is not excluded where it is warranted by the circumstances of the case.[54/]

98. First, there are international arbitral decisions where compound interest has been expressly allowed.[55/]

99. Secondly, there are decisions where the possibility of compound interest appears to have been acknowledged, but the circumstances were not thought to be appropriate for its award.[56/]

100. Thirdly, there is the decision of Chamber I of the Iran-US Claims Tribunal in the *Sylvania Technical Services* case[57/] in which, although it was stated that "the Tribunal has never awarded compound interest", the Tribunal specifically declared its intention to "derive a

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54/ See *FlexiVan v. Iran* 9 Iran-US CTR 206 ("Most awards allocate only simple interest, but occasionally compound interest has been awarded").

55/ *Fabiani's* case (Moore's Digest of International Law 4878-4915 (1905), the *Affaire des Chemins de Fer Zeltweg-Wolfsberg* (UN Reports of International Arbitral Awards, vol. 3, 1795 at 1808 (1934); *Kuwait v. Aminoil* (66 International Law Reports 518, 613 (1982).

56/ *Norwegian Shipowners' Claims* (UN Reports of International Arbitral Awards, vol. 1, 307, at 341 (1922); and the observations of Max Huber in *Great Britain v. Spain (Spanish Zone of Morocco)* (UN Reports of International Arbitral Awards, vol. 2, 615, 650 (1924)).

57/ Iran-US Claims Tribunal Reports, vol. 8, 298.

rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if he had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source."[58/] The late Dr. F.A. Mann has made the following telling comment on this passage: "It is not certain whether the Tribunal realized that investment in six-month certificates of deposit involves earning compound interest."[59/] CDSE [Claimant in the *Santa Elena* case] is entitled to the full present value of the compensation that it should have received at the time of the taking. Conversely, the taking state is not entitled unjustly to enrich itself by reason of the fact that the payment of compensation has been long delayed.

101. Fourthly, there are the views of writers of high authority. Dr. Mann concluded the article just cited as follows: "... it is submitted that, on the basis of compelling evidence, compound interest may be and, in the absence of special circumstances, should

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58/ Iran-US Claims Tribunal Reports, 13, 199.

59/ "Compound Interest as an Item of Damage in International Law", Further Studies in International Law (1990), 380.

be awarded to the claimant as damages by international tribunals."[60/]

102. Finally, reference may be made to the scholarly treatment of the subject by Professor Gaetano Arangio-Ruiz, Special Rapporteur of the UN International Law Commission on State Responsibility. After close consideration of the authorities he concluded as follows: "The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State."[61/]

103. In other words, while simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.

60/ Ibid., p. 385.

61/ Yearbook of the International Law Commission, 1989, Vol. II, Part 1, p. 30.

104. In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.

104. In the instant case, an award of simple interest would not be justified, given that since May 1978, i.e., for almost twenty-two years, CDSE has been unable either to use the property for the tourism development it had in mind when it bought Santa Elena or to sell the property. On the other hand, full compound interest would not do justice to the facts of the case, since CDSE, while bearing the burden of maintaining the property, has remained in possession of it and has been able to use and exploit it to a limited extent.

106. Consequently, Claimant is entitled to an award of compound interest adjusted to take account of all the relevant factors.

19. It should be noted that the members of this Tribunal were L. Yves Fortier, President, and Sir Elihu Lauterpacht and Professor Prosper Weil. Mr. Fortier,

formerly Canada's Permanent Representative to the United Nations, and currently Judge ad hoc of the International Court of Justice, is the President of the London Court of International Arbitration and an international arbitrator of exceptional standing and experience. Sir Elihu Lauterpacht, Honorary Professor at Cambridge University, editor of *International Law Reports,* former President of the Administrative Tribunal of the World Bank and a leading international practitioner for almost fifty years, currently serves as Judge ad hoc of the International Court of Justice. Professor Weil, Professor Emeritus of the University of Paris, is a scholar of extraordinary attainments, the author of many books and articles in the field, an experienced arbitrator and international judge who today enjoys unrivalled stature among French international lawyers. When three international lawyers of the standing of these arbitrators conclude that:

> No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal

it is not possible to sustain the holding of Judge Flannery that "he is constrained to follow the custom" and "must follow this practice" of awarding only simple interest. On the contrary, it is clear that a court of the United States, applying customary international law today, is authorized to award compound interest and is obliged to do so if it adjudges that compound interest is appropriate in the circumstances.

20. *Metalclad Corporation v. The United Mexican* States, 40 International Legal Materials 36 (2001), was an arbitration before an Arbitral Tribunal constituted pursuant to the North American Free Trade Agreement (NAFTA), composed of Professor Sir Elihu Lauterpacht as President; Mr. Benjamin R. Civiletti, former Attorney General of the United States; and Mr. José Luis Siqueiros, a leading Mexican arbitrator. The Tribunal held on August 30, 2000, with respect to prejudgment interest, as follows:

> 128. The question arises whether any interest is payable on the amount of the compensation. In providing in Article 1135 (1) that a Tribunal may award "monetary damages and any applicable interest", NAFTA clearly contemplates the inclusion of interest in an award. On the basis of a review of the authorities, the tribunal in Asian Agricultural Products v. Sri Lanka (4 ICSID Reports 245) held that "interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged" (ibid., p. 294, para. 114). The Tribunal sees no reason to depart from this view. As has been shown above, Mexico's international responsibility is founded upon an accumulation of a number of factors. In the circumstances, the Tribunal considers that of the various possible dates at which it might be possible to fix the engagement of Mexico's responsibility, it is reasonable to select the date on which the Municipality of Guadalcazar wrongly denied Metalclad's application for a construction permit. The Tribunal therefore concludes that interest should be awarded from that date until the date 45 days from that on which this Award is made. So as to restore the Claimant to a

> reasonable approximation of the position to which it would have been if the wrongful act had not taken place, interest has been calculated at 8%, p.a., compounded annually.

The Metalclad decision was appealed by Mexico to the Supreme Court of British Columbia, the designated place of arbitration being Vancouver, B.C. On May 2, 2001, the Court affirmed the arbitral award in part, leaving untouched the award of compound interest.

21. In an even more recent Award of an ICSID Arbitral Tribunal which is not yet published, with the result that the name and parties and arbitrators of the case may not be stated, the Tribunal held as follows:

> 128. To [the amount awarded by the Tribunal as compensation for the Claimant's investment] should be added an appropriate sum for interest. Claimant has claimed interest but neither specified a rate nor whether interest should be compounded. Moreover, the [bilateral investment treaty, or BIT], the lease agreements, and the ICSID Convention and Rules are all silent on the subject of interest. The Panel is of the view that in this case interest should be awarded and that it would be appropriate to adopt a rate of 9% to be compounded quarterly.
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> 129. Like the distinguished panel in the recently-issued *Metalclad* decision, this Tribunal also has determined that compounded interest will best "restore the Claimant to a reasonable approximation of the position in which it

would have been if the wrongful act had not taken place.[290/] Although the *Metalclad* tribunal awarded compound interest without comment, this Panel feels that a brief explanation of its decision is warranted.[291/] This Tribunal believes that an award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations. As Professor Gotanda has observed "almost all financing and investment vehicles involve compound interest.... If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.[292/] For similar reasons, Professor Mann has "submitted that...compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals."[293/]

290/ *Metalclad Corporation v. United Mexican States*, ¶ 128, ICSID Case No. ARB(AP)/97/1 (2000).

291/ As several authorities have noted, "virtually all monetary judgments…contain rulings on interest," and yet, this decision to award interest is often made without any discussion. *See, e.g.*, J. Gillis Wetter, *Interest as an Element of Damages in the Arbitral Process,* 5 Int'l Fin. L. Rev. 20 (1986); F.A. Mann, *Compound Interst as an Item of Damage in International Law*, 21 Univ. of California, Davis L.J. 577, 578 (1988).

292/ John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Amer. J. Int'l. 40, 61 (1996).

293/ F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 Univ. of California, Davis L. J. 577, 586

The Respondent in this case has filed a Request for Annulment with ICSID alleging four defects in the Award, one of which refers to "the appropriate rate of interest, if any."

22. Finally, an award rendered in 1990 in a case in the International Court of Arbitration of the International Chamber of Commerce (ICC) is consistent with the foregoing three international arbitral awards . The governing law was national rather than international but nevertheless the arbitral tribunal referred to the international law of the matter in pertinent terms. The following quotation is from the original English of the award provided by the Secretariat of the ICC Court , the names of the parties being excised in accordance with standard ICC publication practice:

> The Parties disagree with regard to compound interest on the sums due to each of them....
>
> In reality, the Financial Agreement is subject to the rules of international law and the prohibitions of [State X's] internal law – supposing they exist – are not justified on an

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(1988). *See also id.* at 585 ("In this spirit it is necessary first to take account of modern economic conditions. It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest. On the other hand, many are compelled to borrow from banks and therefore must pay compound interest. This applies, in particular, to business people whose own funds are frequently invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks."); *Starrett Housing Corp. v. Iran*, 16 Iran-U.S. Claims Tribunal 112, 251-254 (1987) (Holtzmann, concurring.)

international level...and public order in internal relations, on that point, does not interfere with international contracts.

Moreover, trade usages which, according to article 13 of I.C.C. Rules of Arbitration, the Tribunal must take into consideration, require it to allow for compound interest in favor of both Parties in the present case. Those usages have been...commented on by Gillis Wetter (International Financial Law Review, December 1986), and by Judge Holtzmann (Iran-U.S.A. Claims Tribunal, case Starrett August 14, 1987), recognized by the famous award Aminoil in 1982, and definitively justified by Professor Mann (On Interest, Compound Interest and Damages, 101 Law Q.R. 30.47, 1987).

As Judge Holtzmann said: "Modern economic reality as well as equity demand that injured parties who have themselves suffered actual compound interest charges, be compensated on a compound basis, in order to be made whole."

The principle of "restitutio in integrum" accepted for many centuries must prevail.

In the present situation, it is the fairest solution taking into account the fact that [Defendant], when borrowing to cope with [Claimant]'s default, had to pay compound interest to its lenders.

> As contended by [Defendant], it is the damages themselves that are compounded and [Defendant] is entitled, per application of articles...and...of the Civil Code of [State X], to be given the benefit of compound interest, in order to get the just "compensation for losses incurred through delay in the payment of his debt" (article...of the Civil Code of [State X]).
>
> Both Parties are thereby equally treated.
>
> [Claimant] is to be awarded – independently of the specific provisions of the Financial Agreement – compound interest on the sums held by [Defendant] (as [Defendant] provided for spontaneously, and [Defendant] on the other hand, must be awarded compound interest on the damages to which it is entitled for additional financial costs.

Award in Case No. 5514, December 1990, published in French translation in Arnaldez, Derains, Hascher, *Collection of ICC Arbitral Awards 1991-1995* (1997), at 463-464.

23. The result is not, as Judge Flannery concluded below, that "in applying customary international law, [the Court] must follow [the] practice" of awarding only simple interest. On the contrary, the result of departures from what once had been predominant among the precedents is today to afford discretion to a court applying customary international law to grant compound interest if it concludes that the circumstances at bar merit compound interest.

CONCLUSION

24. In the light of the foregoing cases and considerations, it is my opinion that customary international law affords the Court in this case discretion as to whether to award simple or compound interest. Any rule of customary international law that debarred compound interest has been overruled by a growing practice permitting the award of compound interest in appropriate circumstances. On my understanding of the facts of this case, such appropriate circumstances are present. The District Court found that the expropriation of McKesson's property interest took place in April 1982, some 19 years ago. I am informed by counsel for McKesson that, if compound rather than simple interest had been awarded, the compensation to be received by McKesson would be approximately $36.3 million instead of approximately $20.0 million. In view of this disparity, it is my opinion that provision of full value for the expropriated property interest in this case requires the award of compound interest under customary international law. *A fortiori,* a United States court must award compound interest when, as in the instant case, a governing treaty, the Treaty of Amity, provides for awarding "the full equivalent" of the property taken. 40 *International Law Material 36 (2001).*

/s/ Stephen M. Schwebel
Stephen M. Schwebel

Washington, D.C.
May 8, 2001